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August 15, 2013

The Honorable Rebecca White Berch  
Chief Justice  
Supreme Court of Arizona  
1501 W. Washington, Suite 434  
Phoenix, AZ 85007-3329

Re: Commission on Ethics 20/20

Dear Chief Justice Berch:

The State Bar of Arizona invested significant staff and volunteer resources staying abreast of changes the American Bar Association made to model rules as a result of its Commission on Ethics 20/20. After soliciting member input and analyzing recent rule changes, the State Bar Board of Governors opposes adopting the changes and additions to model rules that deal with admissions and non-member law practice. As a result, the Board of Governors does not plan to authorize any rule-change petitions asking the Court to adopt these changes.

The ABA also made changes to the Model Rules of Professional Conduct, updating them to deal with the challenges of technology and globalization. Although the State Bar is still in the process of reviewing those changes, the Board of Governors expects to authorize a rule-change petition for the 2014 rules cycle that involves at least some – if not all – of the changes, tailored to Arizona's rules.

The model rules at issue in this letter, however, are those on admission on motion, in-house counsel registration, pro hac vice and practice pending admission, as well as changes to Model Rule 5.5 to accommodate the changes related to foreign lawyers.

Most of the changes and additions are intended to make it easier for non-member lawyers to practice in this state or become admitted to practice in this state. In general, we do not believe that adopting the specific changes made by the ABA furthers our profession's obligation to protect the public.

The specific model rules at issue and our preliminary objections to each are:

- Admission on motion: The primary change to the Model Rule on Admission on Motion lowers the active-practice requirement to three of the five preceding years, from five of the preceding seven years. Arizona's Rule 34(f)(1)(C) requires that applicants be primarily engaged in the active practice of law for five of the previous seven years. We are satisfied with the existing requirement. Adopting admission on motion, effective January 1, 2010, already was a sea change for the Arizona legal profession. Lowering the standards so soon is unnecessary.

- In-house counsel registration: The primary change to the Model Rule on In House Counsel Registration allows lawyers admitted only in a foreign jurisdiction to register as in-house counsel and adds restrictions, such as requiring foreign lawyers to provide advice on U.S. law only in conjunction with a U.S. lawyer. Arizona's Rule 38(h) already allows foreign lawyers to register as in-house counsel and practice here, without the restriction of working in conjunction with a U.S. lawyer. As we have seen no problems with Arizona's already more expansive rule, adopting the more restrictive model rule is unnecessary.
- Pro hac vice: The primary change to the Model Rule on Pro Hac Vice allows lawyers admitted only in a foreign jurisdiction to apply to appear pro hac vice, as long as the lawyer is associated with local counsel who also would advise the client on substantive U.S. law. Arizona's Rule 38(a) limits pro hac vice admission to lawyers who are members of "the bar of another state or eligible to practice before the highest court in any state, territory or insular possession of the United States," among other requirements. We see no reason to expand Arizona's rule to include foreign lawyers, particularly under the burdensome requirements imposed by the model rule's new provisions. A judge would have to determine that the foreign lawyer is a member of a "recognized legal profession in [the foreign] jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, and who is not disbarred, suspended or the equivalent thereof from practice in any jurisdiction." In addition, the court *must* weigh factors such as the foreign lawyer's legal training and experience in similar matters and the extent to which the foreign lawyer's relationship and familiarity with the client or with the facts and circumstances of the matter will facilitate the fair and efficient resolution of the matter. For already overloaded trial judges, this would be an unwarranted expectation. While it might be comparatively easy to apply these standards to Canadian or Mexican lawyers, the rule is not geographically limited and would not easily applied to lawyers from myriad countries.
- Practice pending admission: The new ABA Model Rule on Practice Pending Admission would allow an out-of-state lawyer who meets certain criteria to establish a systematic and continuous presence in a jurisdiction for up to a year while the lawyer seeks to become admitted in the jurisdiction. Among other provisions, the lawyer would have to apply, within 45 days, for admission by either motion or examination and "reasonably expect to fulfill all of this jurisdiction's requirements for that form of admission." In addition, the non-member lawyer would have to associate with an admitted lawyer. We strongly disagree with this new model rule. Bar-admission requirements are intended to protect the public from the practice of those not admitted in this jurisdiction. Allowing non-member lawyers not only to practice here but to establish a continuous and systemic presence and hold themselves out as being able to practice this jurisdiction's local law before being completely evaluated and vetted through the admissions process does not protect the public. As this Court is well aware, some lawyers admitted by other jurisdictions do not pass muster here. *See, e.g., In re King*, 212 Ariz. 559, 136 P.3d 878 (2006). Allowing a non-member to practice in this jurisdiction *for up to a year*, with all the rights and privileges of an admitted lawyer, is at best inconsistent.

Because of these positions, we also do not support the changes to Model Rule 5.5, which was amended to add language implementing the foreign-lawyer changes.

The Honorable Rebecca White Berch  
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Finally, while we recognize the realities of modern law practice, such as increased lawyer mobility and multijurisdictional and Internet-based firms, we also are mindful that we already have an existing population of Arizona lawyers, many of whom face difficulties finding employment or maintaining a clientele. We seek first and foremost to protect the public. Secondly, we respect the practice privileges of those already admitted here, many of whom have invested far more time and resources than the specific changes objected to in this letter would require.

Please let me know if the State Bar may be of further assistance on any of these issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Whitney Cunningham', with a stylized, flowing script.

Whitney Cunningham  
President